

**S.119, An Act Relating to Perpetual Conservation Easements
Overview, House Judiciary, Jan. 9, 2014**

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1. *Definition of conservation easement*

S.119 as passed the Senate proposes to add the following definition:

[A] conservation right or interest that is less than a fee simple interest and that restricts the landowner's use or development of land in order to protect the land's natural, scenic, agricultural, recreational, or cultural qualities or resources or other public values. The term excludes interests in fee simple, leases, restrictive covenants not held by a qualified organization, rights-of-way, spring rights, timber harvesting rights, and similar affirmative rights to use or extract resources from the land. The term also excludes trail easements and other public recreational rights unless those easements or rights are included in the stated purposes of a conservation easement.

2. *Amendment of conservation easement*

S.119 proposes to define "amendment" as follows:

[A] modification of an existing conservation easement, the substitution of a new easement for an existing conservation easement, or the whole or partial termination of an existing conservation easement.

3. *Rationale for bill*

Under current law, there is no specified public process for amending conservation easements. Landowners and easement amendment holders may wish to amend conservation easements for a variety of unanticipated circumstances, including correcting drafting errors, moving an allowed house site on the parcel without changing the acreage conserved, or releasing currently conserved land from the easement in return for adding other land to be conserved, possibly of greater amount or conservation value.

4. *Categories of amendments*

S.119 would establish three categories of conservation easement amendments:

- (a) Category 1 amendments, which may be made by the holder without a public review process. Examples: putting additional land under an easement, correcting typographic errors, and "permitting additional uses under the easement that will have no more than a de minimis negative impact on the protected qualities under the easement"

- (b) Category 2 amendments, which are amendments that require a procedural determination by an independent entity concerning whether they may be made without a public review process or whether they should undergo such a process. The independent entity would be an Easement Amendment Panel of the Natural Resources Board, under a process set out in the bill.

Example: Holder agrees to allowing a use on the land that is not contemplated under the existing easement, believes that the use will have not more than a de minimis negative impact on the qualities protected under the easement, and seeks a written determination that this amendment does qualify as Category 1.

- (c) Category 3 amendments, which are amendments that require a public review process. Under the bill, a Category 3 amendments is one which:

- (1) removes a protected quality from the easement or changes the hierarchy of the easement's stated purposes;
- (2) materially reduces the safeguards afforded to the protected qualities under the easement; or
- (3) is not a Category 1 or Category 2 amendment.

Under the bill, if the underlying easement requires approval of an amendment by court order, then it is a Category 3.

5. *Review Processes for Category 3 Amendments*

The bill sets out three options that a holder may employ for approval of a Category 3 amendment:

- (a) Review by an Easement Amendment Panel of the Natural Resources Board, created by the bill.
- (b) Review by the Environmental Division of the Superior Court. If the easement requires amendment approval by court order, then the holder must use this option.
- (c) Holder's own public review process, with potential review of the holder's decision by the Easement Amendment Panel if requested by an eligible party.

6. *Revocation*

The Easement Amendment Panel and the Environmental Division each would have the power to revoke an approval of an easement amendment that it granted, after notice and an opportunity to show compliance.

7. *Appeal*

The bill provides that eligible parties may appeal to the Vermont Supreme Court from a decision on a conservation easement amendment of the Easement Amendment Panel or the Environmental Division. The standard of review would be deferential.

8. *Exemptions*

The bill exempts the following easement amendments from its review provisions: an amendment that requires approval of the General Assembly; an amendment of an easement that a regulatory body required, if the regulatory approval allows the issuing body to approve the amendment; and an amendment that is the result of the exercise of eminent domain under the Vermont constitution.

9. *Other Areas*

In addition to the easement amendment review provisions, the bill includes other sections, including sections that provide: (a) a conservation easement is not extinguished if the holder becomes the fee owner of the underlying land, (b) a tax lien would not affect a previously recorded conservation easement on the same property; and (c) a conservation easement is not subject to the requirement to file a notice of claim on the land records every 40 years.